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9 IN THE UNITED STATES DISTRICT COURT

10 FOR THE DISTRICT OF OREGON

11 SARAH STEWART (f.k.a. Sarah)
Hills),)

12 Plaintiff,)

No. CV-04-428-HU

13 v.)

14 SEARS, ROEBUCK AND CO., a)
15 a foreign corporation,)

SUPPLEMENTAL FINDINGS &
RECOMMENDATION

16 Defendant.)
17 _____)

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25 HUBEL, Magistrate Judge:

26 Plaintiff Sarah Stewart, formerly known as Sarah Hills, brings
27 this employment action against defendant Sears, Roebuck & Company,
28 her former employer. Plaintiff contends that defendant violated

1 her rights under the federal Family Medical Leave Act (FMLA) and
2 Oregon's Family Leave Act (OFLA). She also brings a state common-
3 law wrongful discharge claim and a claim under Oregon Revised
4 Statute § (O.R.S.) 652.150 for the alleged failure to timely pay
5 her wages at the time of her discharge.

6 Defendant moves for summary judgment on both Leave Act claims
7 and the wrongful discharge claim. In a March 7, 2005 Findings &
8 Recommendation, I recommended denial of defendant's motion except
9 as to plaintiff's OFLA claim. I deferred ruling on that claim
10 pending further briefing and oral argument. Having considered the
11 additional submissions and the parties' oral arguments, I recommend
12 that defendant's motion regarding the OFLA claim be granted.

13 STANDARDS

14 Summary judgment is appropriate if there is no genuine issue
15 of material fact and the moving party is entitled to judgment as a
16 matter of law. Fed. R. Civ. P. 56(c)). The moving party bears the
17 initial responsibility of informing the court of the basis of its
18 motion, and identifying those portions of "'pleadings, depositions,
19 answers to interrogatories, and admissions on file, together with
20 the affidavits, if any,' which it believes demonstrate the absence
21 of a genuine issue of material fact." Celotex Corp. v. Catrett,
22 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

23 "If the moving party meets its initial burden of showing 'the
24 absence of a material and triable issue of fact,' 'the burden then
25 moves to the opposing party, who must present significant probative
26 evidence tending to support its claim or defense.'" Intel Corp. v.
27 Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991)
28 (quoting Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th

1 Cir. 1987)). The nonmoving party must go beyond the pleadings and
2 designate facts showing an issue for trial. Celotex, 477 U.S. at
3 322-23.

4 The substantive law governing a claim determines whether a
5 fact is material. T.W. Elec. Serv. v. Pacific Elec. Contractors
6 Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). All reasonable doubts as
7 to the existence of a genuine issue of fact must be resolved
8 against the moving party. Matsushita Elec. Indus. Co. v. Zenith
9 Radio, 475 U.S. 574, 587 (1986). The court should view inferences
10 drawn from the facts in the light most favorable to the nonmoving
11 party. T.W. Elec. Serv., 809 F.2d at 630-31.

12 If the factual context makes the nonmoving party's claim as to
13 the existence of a material issue of fact implausible, that party
14 must come forward with more persuasive evidence to support his
15 claim than would otherwise be necessary. Id.; In re Agricultural
16 Research and Tech. Group, 916 F.2d 528, 534 (9th Cir. 1990);
17 California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics,
18 Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

19 DISCUSSION

20 As noted in the March 7, 2005 Findings & Recommendation, the
21 issue is whether plaintiff can maintain a retaliation cause of
22 action under OFLA. In a 2002 decision, I determined that OFLA did
23 not allow for a retaliation claim. Denny v. Union Pac. R.R., No.
24 CV-00-1301-HU, Findings & Rec. at pp. 7-9 (D. Or. Oct. 31, 2002),
25 adopted by Judge Jones, January 20, 2003. I concluded that an
26 Oregon Administrative Rule (OAR) adopted by the Oregon Bureau of
27 Labor and Industries (BOLI) unlawfully expanded the scope of the
28 rights afforded by the statute. Id.

1 In the instant case, plaintiff argues that rather than adhere
2 to the reasoning in Denny, which a number of Judges in this
3 District have followed¹, I should adopt the reasoning and holding
4 of a recent Oregon Court of Appeals decision, Yeager v. Providence
5 Health System Oregon, 195 Or. App. 134, 96 P.3d 862, rev. denied,
6 237 Or. 658, 103 P.3d 641 (2004), which recognized the existence of
7 an OFLA retaliation claim.² I reject plaintiff's argument.

8 The Yeager court's analysis begins by noting that under Oregon
9 Revised Statute § (O.R.S.) 659A.885(1), "[a]ny individual claiming
10 to be aggrieved by an unlawful practice specified in subsection (2)
11 of this section may file a civil action in circuit court." Id. at
12 138, 96 P.2d at 864. Yeager also noted that O.R.S. 659A.885(2), in
13 turn, provides that "[a]n action may be brought under subsection
14

15 ¹ Ladendorff v. Intel Corp., No. CV-02-6259-AS, Opinion &
16 Order at pp. 14-20 (D. Or. Mar. 19, 2004) (Judge Ashmanskas);
17 Louemna v. Les Schwab Tire Ctrs of Portland, Inc., No. CV-02-856-
18 KI, 2003 WL 23957142, at *6 (D. Or. Oct. 2, 2003) (Judge King)
Head v. Glacier Northwest, Inc., No. CV-02-373-MA, Opinion &
Order at p. 3 (D. Or. Apr. 30, 2003) (Judge Marsh).

19 ² Because Yeager is a decision of the Oregon Court of
20 Appeals and not the Oregon Supreme Court, I am not required to
21 follow it in interpreting questions of state law. See Vestar
22 Dev. II, LLC v. General Dynamics Corp., 249 F.3d 958, 960 (9th
23 Cir. 2001) ("When interpreting state law, federal courts are
24 bound by the decisions of the state's highest court"). In the
25 absence of binding Oregon Supreme Court precedent, the role of
26 this Court is to predict how that Court will rule. Id. While
27 intermediate appellate decisions can useful for that purpose, I
28 am not obligated to follow those decisions if there is evidence
that the Oregon Supreme Court might decide the issue differently.
Here, I cannot rely on the Yeager decision as a predictor of how
the Oregon Supreme Court would rule on this issue when there is
no evidence showing that the argument on which I base my decision
was raised in Yeager. I conclude that if the Oregon Supreme
court were presented with the precise issue, it would not follow
Yeager.

1 (1) of this section for the following unlawful practices[,] then
2 listing a number of specific statutes in O.R.S. Chapter 659A,
3 including O.R.S. 659A.150 to O.R.S. 659A.186, the statutes
4 comprising OFLA. Id.

5 Under the OFLA statutes, OFLA unlawful employment practices
6 are limited to denials of requested OFLA leave. O.R.S. 659A.183.
7 Thus, the defendant in Yeager, like the defendant in Denny, and the
8 defendant in the present case, argued that the Oregon Legislature
9 did not provide a civil action for retaliatory discharge under
10 OFLA.

11 Yeager noted that O.R.S. 659A.001(12) "defines 'unlawful
12 practice' for purposes of OFLA to include 'a practice that violates
13 a rule adopted by the commissioner for the enforcement of the
14 provisions of this chapter.'" Id. at 138, 96 P.3d at 865 (emphasis
15 added in Yeager). BOLI's relevant administrative rule provides
16 that

17 [i]t is an unlawful employment practice for an employer
18 to retaliate or in any way discriminate against any
19 person with respect to hiring, tenure or any other term
20 or condition of employment because the person has
inquired about OFLA leave, submitted a request for OFLA
leave or invoked any provision of the Oregon Family Leave
Act.

21 OAR 839-009-0320(3).

22 Yeager relied on the definition of "unlawful practice" in
23 O.R.S. 659A.001(12) and OAR 839-009-0320(3) to conclude that

24 the relevant statutes and administrative rule make it
25 clear that the legislature intended to provide a civil
26 action for an unlawful practice under OFLA. An unlawful
27 practice is defined to include a violation of a rule
28 adopted by BOLI. Here, BOLI has adopted a rule that
makes it an unlawful employment practice to retaliate
against an employee for inquiring about OFLA leave,
submitting a request for OFLA leave, or in any way
invoking the provisions of OFLA. In combination, the

1 relevant statutes and administrative rule create a civil
2 remedy for retaliatory discharge under OFLA.

3 Yeager, 195 Or. App. at 139, 96 P.3d at 865.

4 Plaintiff also notes that both Judge King and Judge Mosman of
5 this District have followed Yeager to allow an OFLA retaliation
6 claim. Viken v. North Pac. Group, Inc., No. CV-03-932-MO,
7 Transcript of Oral Arg. on Cross-Motions for Sum. Jdgmt pp. 9, 45-
8 46 (Docket #118) (D. Or. Oct. 26, 2004); Spees v. Willamina Sch.
9 Dist. 30J, No. CV-03-1425-KI, Opinion at p. 15 (D. Or. Oct. 19,
10 2004).

11 While Yeager's citation to O.R.S. 659A.001(12) is relevant, I
12 conclude that the Yeager court's analysis does not go far enough
13 and thus, its holding is not supportable. It does not appear from
14 the discussion in Yeager that the parties urged the court to focus
15 on the precise listing of statutes in O.R.S. 659A.885(2) and the
16 omission from that list of either O.R.S. 659A.001(12) or O.R.S.
17 659A.805(1)(e) which gives BOLI authority to adopt rules
18 "[c]overing any . . . matter required to carry out the purposes of
19 this chapter." As a result of the likely failure of the parties to
20 raise this issue with the Yeager court, the court failed to address
21 the fact that while O.R.S. 659A.001(12) includes certain practices
22 established under BOLI rules as "unlawful practices," O.R.S.
23 659A.885(1) and (2) do not include an unlawful practice as defined
24 by BOLI regulation as one giving rise to a civil cause of action.
25 Neither O.R.S. 659A.001(12) nor O.R.S. 659A.805(1)(e) were listed
26 by the Legislature in O.R.S. 659A.885(2). Similarly, these issues
27 and arguments do not appear to have been raised before Judge King
28 or Judge Mosman in their respective cases.

1 As in Yeager, the starting point is O.R.S. 659A.885(1).
2 There, the Oregon Legislature creates a civil cause of action for
3 individuals aggrieved by the unlawful practices specifically listed
4 in O.R.S. 659A.885(2). In O.R.S. 659A.885(2), the Legislature
5 enumerated several specific Oregon statutes for which an action may
6 be brought under O.R.S. 659A.885(1). Notably, the Legislature did
7 not state in O.R.S. 659A.885(1) and (2) that a civil action may be
8 brought for all "unlawful practices" found in O.R.S. Chapter 659 or
9 all "unlawful practices" as defined by statute or BOLI regulation,
10 something the Legislature could easily have done.

11 Rather, the Legislature chose to specifically delineate, by
12 referring to precise O.R.S. sections, which statutory unlawful
13 practices give rise to a civil action. O.R.S. 659A.001(12),
14 defining unlawful practice to include the violation of a BOLI rule,
15 and O.R.S. 659A.805(1) (e), giving BOLI the authority to adopt rules
16 covering any other matter required to carry out the purpose of
17 O.R.S. Chapter 659, are not in the enumerated list in O.R.S.
18 659A.885(2).

19 As a result, I can reach no conclusion other than that the
20 Legislature did not create a civil cause of action under O.R.S.
21 659A.885(1) and (2) for violations of unlawful practices that are
22 defined only by a BOLI rule and not by one of the statutes listed
23 in O.R.S. 659A.885(2). Since a retaliation cause of action is not
24 made an unlawful practice in the OFLA statutes themselves, which
25 are referenced in O.R.S. 659A.885(2), such a cause of action is not
26 maintainable under O.R.S. 659A.885(1) and (2).

27 Without the Legislature having listed O.R.S. 659A.001(12) or
28 O.R.S. 659A.805(1) (e) in O.R.S. 659A.885(2), BOLI's regulation that

1 purports to create a retaliation cause of action under OFLA, OAR
2 839-009-0320(3), is beyond the authority delegated to BOLI by the
3 Legislature. That is, by not listing those statutes in O.R.S.
4 659A.885(2), the Legislature did not give BOLI the delegated power
5 to establish a new civil cause of action.

6 It is important to note that while I am sympathetic to
7 plaintiff's position, given the statutory framework, I have only
8 supposition that the Legislature intended to create a retaliation
9 cause of action under OFLA. Supposition is not a proper basis upon
10 which to rewrite the plain language of the statutes. It is not
11 this Court's role to substitute its judgment for that of the
12 Legislature.

13 For the reasons initially expressed in Denny, and for the
14 reasons explained in this Supplemental Findings & Recommendation,
15 I conclude that Oregon does not provide a retaliation claim for
16 requesting OFLA leave.

17 CONCLUSION

18 I recommend that defendant's motion for summary judgment
19 (#22) as to the OFLA claim, be granted.

20 SCHEDULING ORDER

21 The above Supplemental Findings and Recommendation will be
22 referred to a United States District Judge for review together with
23 the March 7, 2005 Findings & Recommendation on the OFLA claim.
24 Objections, if any, are due May 2, 2005. If no objections are
25 filed, review of the March 7, 2005 Findings and Recommendation and
26 this Supplemental Findings & Recommendation will go under
27 advisement on that date.

28 If objections are filed, a response to the objections is due

1 May 16, 2005, and the review of the March 7, 2005 Findings and
2 Recommendation and the Supplemental Findings & Recommendation will
3 go under advisement on that date.

4 IT IS SO ORDERED.

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6 Dated this 15th day of April, 2005.

7
8 /s/ Dennis J. Hubel

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Dennis James Hubel
United States Magistrate Judge